Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRENDA BOYNTON, PETITIONER

v.

WESTERN WYOMING COMMUNITY COLLEGE,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Title VII Civil Rights retaliation case, where motive and intent are at issue, should a Motion for Summary Judgment against the plaintiff be considered under heightened scrutiny?

2. In a Title VII Civil Rights retaliation case, where motive and intent are in issue, is a plaintiff's Seventh Amendment right to a jury trial infringed where, under the "Celotex Trilogy", summary judgment is granted based upon discrete facts rather than upon the totality of the circumstances?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is not reported and appears in the Appendix at p. 1a, infra.

The Opinion of the United States District Court for the District of Wyoming is also unreported and appears in the Appendix at p. 12a, infra.

JURISDICTION

The Opinion, Order and Judgment of the Tenth Circuit Court of Appeals was entered on the 29th day of November, 2005. Petition for Rehearing was denied on January 6, 2006. An Order Granting Extension of Time to File a Petition for Writ of Certiorari was granted on February 14, 2006, extending the time to file a Petition for Certiorari to June 5, 2006.

This Petition is being docketed in this Court within the time period allowed by the Order of this Court. The jurisdiction of this court is invoked pursuant to 28 USC §1254. The basis for federal jurisdiction in the first instance was 28 USC §1331, a civil action arising under the Constitution laws, on treaties of the United States, and 28 USC §1343(a)(3), a civil action to redress the deprivation, under color of state law, statute, ordinance, custom or usage of any right, privilege or immunity secured by the Constitution of the United States.

RELEVANT PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution, in pertinent part, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

Federal law at 42 USC §2000e-3(a), in pertinent part, provides:

> Other unlawful employment practices.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter.

Federal law, at 42 USC §1981a(c)(l), provides:

> If a complaining party seeks compensatory or punitive damages under this section--
>
> (1) any party may demand a trial by jury.

Rule 56(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part, as follows:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This is a Title VII retaliation case under Section 704 of the Civil Rights Act of 1964, as amended, (42 USC §2000e-3). The petitioner alleged that she was terminated as a result of her good faith opposition to hostile environment sex discrimination. The District Court granted Summary Judgment based upon petitioner's purported failure to show evidence of causal connection between protected activity and adverse employment action. (Appendix, pages 11a through 27a.) See Clark County School District v. Breeden, 532 U.S. 268 (2001). On appeal to the Tenth Circuit Court of Appeals, a panel affirmed. (Appendix pages 1a through 12a.)

The petitioner seeks a Writ of Certiorari to review the applicability of the "Celotex Trilogy" (infra) to Title VII claims under the burden shifting framework of McDonnell-Douglas v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). This court's review of the 1972 McDonnell-Douglas evidentiary paradigm is necessary in light of heavier burdens placed on nonmovants in summary judgment proceedings by the 1986 "Celotex Trilogy" (infra) and Congressional action to allow trial by jury in

discrimination cases in the 1991 Amendments to the Civil Rights Act of 1964, (42 USC §1981a). These developments in the law of civil rights have given rise to conflicts among the circuits regarding the kind and amount of evidence necessary to be shown to survive a motion for summary judgment. Compare Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000), ("The long and short of it is that summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the sale."); with Wallace v. DTG Operations, Inc., 442 F.3d 1112, ___ (8th Cir. 2006), ("[A]lthough Rule 56 contains only one standard, we must exercise particular caution when examining the factual question of intent to ensure that we dutifully extend all justifiable inferences in favor of the nonmoving party.")[1]

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[1]Other Circuits have used different language when describing the care that must be given to summary judgment motions in Title VII actions. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000), ("Courts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent."); Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 87 (2nd Cir. 1996), ([T]rial courts must be especially cautious in handing out summary judgment in discriminary cases...."); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 958-59 (4th Cir. 1996) ("Courts must take special care."); Perry v. McGinnis, 209 F.3d 597, 600 (6th Cir. 2000), ("Summary judgment is generally not well suited for cases in which motive and intent are at issue and in which one party is in control of the proof."); McCoy v. WGH Continental Broadcasting Co., 957 F.2d 368, 370-371 (7th Cir. 1992) (Summary Judgment standard of review"...is applied with added rigor in employment discrimination cases:; Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) ("We require very little evidence to survive summary judgment...."); Randle v. City of Aurora, 69 F.3d 441, 443 (10th Cir. 1995) (Judgments about intent are best left for trial and are within the province of the jury."); Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004), ("Summary judgment rule applies in job discrimination cases as in other cases. No thumb is to be placed on

Factual Background

Brenda Boynton was a full-time custodian at Western Wyoming Community College in Sweetwater County, Wyoming, from December 1, 1997, until her termination in February, 2003, a period of nearly six (6) years. During the initial few years of her employment, Miss Boynton, while working at the College's Rock Springs Campus, received several job performance evaluations from her supervisor which demonstrate that she was a good performer:

> "This supervisor has received quite a few compliments on this employee"
>
> "Brenda spends her time very productively"
>
> "She is able to communicate with her fellow employees about work and how she may improve it"
>
> "This employee is a very dependable young lady and works overtime when offered"
>
> (Aplt. App. pp. 99-106.)

However, while working at the Rock Springs Campus, her male supervisor engaged in some rather bizarre and offensive conduct. In her affidavit, responding to the defendant's Motion for Summary Judgment, she explained:

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either side of the scale.")

"However, during my employment, Gary Bussart behaved in a way which was offensive to me. Specifically, on one occasion Mr. Bussart entered the ladies room at the College while I was using it and, while I was still in the stall, asked me why I was using the men's room. I told him that I was not using the men's room, that this was the ladies room and asked him to leave. He refused to do so. I finished using the toilet and left the ladies room. At that time, I talked about the incident with a co-employee, Tana Sheppard, and was advised by her that such had happened previously.

"On another occasion, Mr. Bussart came into the men's room while I was clearly cleaning it and proceeded to use the urinal in my presence. I verbally objected to such and left the men's room and contacted Rich Mathews, Gary Bussart's supervisor, and complained. Rich Mathews simply said, "That's Gary!" and left it at that."

(Aplt. App. pp. 20-21.)

In 1998, Miss Boynton was transferred to the Green River Campus of the College, (in the nearby Town of Green River, Wyoming), and came under the joint supervision of her original supervisor and the Green River Facility Manager, Mrs. Huebner. However, Miss Boynton's job performance reviews continued to be quite "satisfactory":

"Brenda is a reliable employee who conscientiously fulfills her job description."

"Brenda fulfills her job description to the fullest."

"Fulfills the job description."

After the transfer to the Green River Center, however, Miss Boynton became pregnant. For some reason, her male supervisor took offense and acted with hostility toward petitioner. Miss Boynton, in her affidavit, described his behavior, her subsequent complaint to the College President and the College's response:

> "After being transferred to the Green River Center, I became pregnant and notified Mr. Bussart of such. Mr. Bussart took offense to my pregnancy and said, "How dare you do this to me?," in a manner I felt was inappropriate. Thereafter, he continually told me that he didn't think single, pregnant women should work for him, and requested, on several occasions, that I provide to him a specific date for the birth of my child, and insisted that I take maternity leave prior to my child's birth. During this period of time, Mr. Bussart disturbingly seemed to "hover" over me and follow me around while I performed my duties. All of these activities served to make my work at WWCC unpleasant and hostile toward me as a woman.
>
> "**On September, 25, 2000**, and prior to my return from maternity leave, I arranged to have a meeting with the President of the College, Dr. Tex Boggs. At this meeting, I expressed to Dr. Boggs my displeasure with Mr. Bussart's behavior toward me, regarding so-called "restroom incidents," and his related hostile attitude toward me as a woman, my pregnancy, and other matters.

I did this to try to rectify the situation before I returned to work. At these meetings, I was advised that the College would conduct an investigation and report back to me.

"**On the 9th day of October, 2000**, I received the attached letter from Mr. Marty Kelsey, the Assistant to the President of the College, indicating that they had spoken with various persons, including Mr. Bussart and Mary Ann Huebner, and explained to them my complaints about Mr. Bussart. (Exhibit F.) The letter indicates that Mr. Bussart denied the accusations and that Mrs. Huebner was informed of my complaints about him, but could not confirm them. The letter indicated that nothing further would be done by the College because the allegations were denied and no evidence existed to confirm them.

"However, I have since learned from the testimony of Dean Marty Kelsey and Dr. Tex Boggs that both had knowledge of other incidents in which Mr. Bussart had invaded the "bathroom privacy" of other women employees, specifically Tana Sheppard, Donna Poulos and Jean Gibbons. Also, Mr. Bussart, in his deposition, admitted to the prior incidents, but denied the incidents I reported."

On October 10, 2000, the day immediately following the October 9, 2000, no-cause letter, a continuous and sequential succession of retaliatory conduct was commenced by her supervisor that lasted roughly two years and culminated in Brenda Boynton's termination in February, 2003. The day after Miss

Boynton was advised by the College that her allegations about Bussart's conduct would go nowhere, Miss Boynton was given a "marginal" job performance review by her supervisor--her first low evaluation in more than three years of employment. Gary Bussart, Brenda Boynton's direct supervisor, and Mary Ann Huebner, the facility manager, rated Brenda Boynton as "marginal" in the area of "Job Related Communication Skills" with the following "Comment":

> Brenda attends the staff meetings as requested. **When Brenda encounters problems or has questions regarding her work, she should first ask the onsite supervisor/direct supervisor.**" (Emphasis supplied.)

On the general comments section of the evaluation of October 10, 2000, given the day after the College acquitted Mr. Bussart of the Boynton allegations, Gary Bussart **and** Mary Ann Huebner said:

> Brenda has been dependable in coming to work on time. **Brenda needs to realize she is part of the GRC team and it would be beneficial to her to work together with the other staff people.** (Emphasis supplied.)

In addition to receiving the marginal evaluation from Huebner/Bussart, after returning from maternity leave and meeting with Dr. Boggs, Mr. Bussart began to criticize her work at every turn, though there were no formal "write-ups" for a few months. In February, 2001, however, Mr. Bussart, over Miss Boynton's verbal objection, again invaded her privacy by bursting into her

locked break room while she was manually pumping her breasts for milk for her baby, watched while she covered up, and then insisted that he had a right to be in the break room, even when locked. Complaint to Mrs. Huebner resulted in reprimand and direction that breast pumping be done in the ladies room. (Aplt. App. pp. 23-24.) This incident was soon followed by a "special" Job Performance Evaluation, covering October 10, 2000, through March 12, 2001, in which Miss Boynton was judged "UNSATISFACTORY" in the areas of "Quality of Work," "Productivity and/or Efficient Time Use," and "Job Related Communication Skills," while her "Job Knowledge" was deemed merely "MARGINAL".

Following the "unsatisfactory" evaluation of March, 2001, Miss Boynton was put on the first of three consecutive "Remediation Plans," by her supervisors. In general, these "Plans," prepared jointly by Bussart and Huebner and reviewed by Mr. Kelsey, (who had cleared Bussart despite knowing his record), required Miss Boynton to keep a detailed daily written log of her job activities in ten-minute increments. In addition, she was to e-mail a daily report to Huebner/Bussart in which she was to report three "unusual events" that occurred during her shift.

In June, 2001, yet a third consecutive critical Job Performance Evaluation was prepared by Bussart and Huebner in which Miss Boynton was again rated to be an exceedingly poor employee and which recommended to Dr. Boggs her immediate termination as an employee. Dr. Boggs, being concerned that the Remediation Plan might constitute "retaliation," declined to immediately terminate Miss Boynton; but, instead, authorized a second and then a third Remediation Plan to be administered

solely by Mary Ann Huebner.

Finally, in the Spring of 2002, Ms. Huebner sent a memo to her staff imploring them to evaluate Brenda Boynton on her performance; suggesting that if her performance was "unsatisfactory" that specific examples be recalled, "including number of times the incident has occurred," and "seeking any documentation you may have, such as e-mails or anything else."

A Notice of Proposed Termination for cause followed wherein the College alleged that Miss Boynton should be terminated based upon several, but minor and arguably pretextual problems caused by faulty equipment, failure to train and conflicting directives. For instance, Miss Boynton was criticized for not properly operating a "sander" used to sand a steep hill on snowy days; the sander, however, proved to be inoperable when the sand was "frozen" into chunks and could not be spread which typical occurred on snowy days. Miss Boynton allegedly could not efficiently use the "snow plow" because a co-worker failed to instruct her on using a "cheater bar" to attach the blade. She was criticized for her supervision of unruly grade school ballet students despite the presence of the ballet teacher; and for not turning off a fire alarm before she determined there was no fire. She was criticized for not cleaning "mouse droppings" from Ms. Huebner's uncleared desk; while Mr. Bussart had specifically directed her not to clean desks that have not been cleared. Finally, she was blamed for not timely cleaning-up a few dead "miller moths" that infest Wyoming every Spring and early Summer.

Based upon these late reported and trivial complaints, and after nearly eighteen months of

"remediation plans", the College began termination proceedings against Ms. Boynton. The College's Board of Trustees convened a hearing to consider the proposed termination, but none of the Board members attended the hearing. At the hearing, evidence was admitted showing that the President of the College knew that the petitioner's supervisor had a history of harassing women in the ladies room; that the supervisor issued a marginal job performance evaluation the day after the College found no cause for petitioner's complaint; that three consecutive remediation plans were then imposed; that the College President had concern that the supervisor's termination recommendation was motivated by "retaliation"; that petitioner's performance was next to exemplary prior to her complaint; and that adverse employment action was taken **one day** after the College issued its no-cause decision on her complaint.

The Board, after purportedly reviewing the transcript of the hearing, nevertheless voted to terminate petitioner's employment.

Disposition Below

Exhausting required administrative remedies, petitioner filed suit in the United States District Court for the District of Wyoming alleging unlawful retaliation pursuant to Section 704 of Title VII of the Civil Rights Act of 1964, 78 STAT. 257, as amended, and codified at 42 USC §2000e-3(a). After discovery, the respondent College submitted a motion for summary judgment pursuant to Rule 56(c) F.R.Civ.P. in which the College offered evidence that the building supervisor, who ultimately recommended termination, purportedly did not know about petitioner's protected activity. Therefore,

the College argued, summary judgment should be granted since there was no evidence of causal connection between the protected activity and the adverse employment action of termination, and the defendant had cause for discharge.

Petitioner responded to the respondent's motion by submitting her detailed affidavit specifically showing the hostile environment created by her supervisor, her complaint about such to the College President, and the adverse action, which began one day after the College closed down its investigation, which continued for the better part of two years in the form of repeated and onerous "remediation plans", culminating with termination based upon pretextual reasons.

Citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the United States District Court granted the respondent's Summary Judgment Motion on the eve of trial. The Court assumed that the plaintiff had shown protected opposition and adverse employment action, but held that she had not shown a causal connection between them. Relying upon Peterson v. Utah Dept. of Corrections, 301 F.3d 1182, 1188 (10th Cir. 2002), and Luckie v. Ameritech Corp., 389 F.2d 708, (7th Cir. 2004), the Court found that because there was evidence that the building supervisor did not know of the plaintiff's protected activity when she recommended termination, she did not have the retaliatory motive to link the protected activity to the adverse action; therefore, the court ruled the College itself did not know of the protected activity. This, of course, ignored other copious and undisputed evidence that the College President, the Dean of Administration, the petitioner's supervisor and, eventually, the seven-member Board of Trustees, knew

that she had engaged in protected activity immediately before her supervisor commenced giving her poor evaluations, imposed repeated and continuous sequence of onerous remediation plans, and recommended termination; and that by turning the administration of a continued and already tainted and retaliatory remediation plan over to someone without knowledge, merely made that person the cats paw of the person with *animus*. See e.g. Stimpson v. Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Haas v. Advosys., Inc., 168 F.3d 732 (5th Cir. 1999).

On appeal, a panel of the Tenth Circuit Court of Appeals affirmed the lower court in an unpublished opinion which, for the most part, simply adopted the District Court's decision, (and the appellee's statement of facts), without elaboration. (Appendix, p. 9a.) The Tenth Circuit described its "Standard of Review" in summary judgment cases by reference to its' decision in Garrison v. Gambro, 428 F.3d 933, 935 (10th Cir. 2005), which sets forth the now familiar standards of review articulated by this Court in the "Celotex Trilogy" of cases decided in 1986 (infra) which established judicial receptivity to summary judgment. In Garrison, supra, the Tenth Circuit said:

> We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P. 56(c). When applying this standard, we view the

evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof.

The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; **an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.** (citing Simms v. Okla. ex.rel. Dept. of Mental Health and Substance Abuse Services, 65 F.3d 1321, 1326 (10th Cir. 1999).

(Emphasis Supplied.)

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE SCRUTINY THAT EVIDENCE OF CAUSALITY SHOULD BE GIVEN IN CIVIL RIGHTS CASES IN WHICH SUMMARY JUDGMENT IS SOUGHT.

This Court should grant a Writ of Certiorari to consider the nature, kind and quantity of evidence that

must be shown by a Title VII plaintiff to survive a Motion for Summary Judgment within the evidentiary framework first described in McDonnell-Douglas v. Green, 411 U.S. 793 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), under the standard of review in summary judgment proceedings described by this court in the "Celotex Trilogy" announced in 1986. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 477 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 574 (1986); and Celotex v. Catrett, 477 U.S. 317 (1986).

Where there is no direct evidence of retaliation under 42 USC §2000e-3, a retaliation claim is analyzed under the McDonnell-Douglas burden shifting framework. Jeffries v. State of Kansas, 147 F.3d 1220, 1231 (10th Cir. 1998). The employee must first present a prima facie case by showing, 1) she engaged in protected opposition to discrimination; 2) that the employer took an adverse employment action against her; and, 3) that there is a "causal connection" between the protected activity and the adverse action. Stover v. Martinez, 382 F.3d 1064, 1073 (10th Cir. 2004). After a prima facie case has been shown, the burden shifts to the defendant to produce or "articulate" evidence of legitimate non-discriminatory justification for the action. The burden shifts back to the employee to provide evidence showing that the employer's proffered reason is a pretext for discrimination. An employee may demonstrate pretext by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255 n.10 (1981).

The burden-shifting framework of McDonnell-

Douglas-Burdine, announced nearly twenty years before jury trials were allowed in the 1991 Amendments to the Civil Rights Act of 1964, (42 USC §1981a(c)) was designed to ease the evidentiary burden on "employment discrimination plaintiffs who rarely...have access to direct evidence of intentional discrimination." Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987). The "Celotex Trilogy" cases, on the other hand, eased the burdens of movants in summary judgment proceedings and increased the burdens of nonmovants to produce evidence sufficient to convince a reasonable jury. See Celotex, supra, 477 U.S., p. 323, (a movant need not negate a nonmovant's case to achieve summary judgment); and Anderson, supra, 470 U.S. at pp. 250-251, (a nonmovant must produce evidence sufficient for a jury to return a verdict for nonmovant).

The burden-shifting framework of McDonnell-Douglas-Burdine, which is also applied to retaliation cases under Section 704 of the Act, (42 USC §2000e-3), (see Jeffries v. State of Kansas, 147 F.3d 1220, 1231 (10th Cir. 1998)), making it easier for a plaintiff to prove discrimination without direct evidence through the use of circumstantial inference, appears to be in conflict with the rules of the "Celotex Trilogy", which requires that a nonmovant bring forth all its evidence to show that a reasonable jury would find in her favor. Anderson, supra, 470 U.S. at 250-251.

This conflict in judicial policy and purpose, that is, providing a means for discrimination plaintiffs to prove by inference a prima facie case, while making it more difficult for nonmovants to overcome motion for summary judgment, seems to have resulted in some courts to self-consciously announce that it would use "added vigor," or

"special caution" or be "especially chary" in ruling on summary judgment motions. On the other hand, other courts have boldly said that, in discrimination cases, no "special caution" or other deference would be given circumstantial evidence of "intent" provided by discrimination claimants.

The split in the circuits regarding the purported "transsubstantive norm" of Rule 56 and suitability of summary judgment in employment discrimination cases is exemplified by comparing cases in the Seventh and Eighth Circuits with those in the Eleventh Circuit. Brunett, Redish and Reiter, Summary Judgment, Federal Law and Practice, Second Edition, §9.01. Most recently, the Eighth Circuit, in Wallace v. DTG Operations, Inc., No. 04-3345, 442 F.3d 1112 (8th Cir. 2006), (supra) has said that, "[S]ummary judgment should be used sparingly in the context of employment discrimination and/or retaliation case where direct evidence is often difficult or impossible to obtain", and that it would",...exercise **particular caution** when examining the factual question of intent to ensure that we dutifully extend all justifiable inferences in favor of the non-moving party. Wallace, supra. The Seventh Circuit has utilized a standard of "added vigor" in reviewing motions for summary judgment in discrimination cases. Alexander v. Wisconsin Dept. of Health, 263 F.3d 673, 681 (7th Cir. 2001). In contrast, the Eleventh Circuit, though once announcing that, "[A]s a general rule summary judgment is not a proper vehicle for resolving claims of employment on an employer's motivation and intent", Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 644 (11th Cir. 1987); accord Batey v. Stone, 24 F.3d 1330, 1336 (11th Cir. 1994), now finds that such a rule has not been "recently followed" and that today no special caution should be

applied in discrimination cases. "The long and the short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale." Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000).

The Supreme Court should grant certiorari in this matter to resolve whether, given the remedial purposes of the Civil Rights Act of 1964 and the evidentiary framework of McDonnell-Douglas v. Burdine, defendants in Title VII Civil Rights cases should bear heightened burdens of production and persuasion in summary judgment proceedings where the evidence of discrimination is necessarily indirect and inferential. It is clear that the Circuit Courts have long believed that, in discrimination cases, where intent and motive are at issue, summary judgment is disfavored; yet, at least one Circuit Court has said that defendants bear no increased burdens, and plaintiffs are given no deference, in job discrimination summary judgment proceedings.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ONLY UPON THE TOTALITY OF THE CIRCUMSTANCES RATHER THAN UPON DISCRETE FACTS.

In retaliation cases, Federal Law makes it unlawful

> ...for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful practice by [Title VII] or because [the employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under

[Title VII].

42 U.S.C. §2000e-3(a)

This statute prohibits retaliation against an employee who has engaged in activity protected by Title VII. Unless there is direct evidence of retaliation, the burden shifting analysis set forth in McDonnell-Douglas v. Green, 411 U.S. 793, 802-804 (1973) is followed:

> Following this framework, an employee must first present a prima facie case of retaliation, which then shifts the burden to the employer to produce a legitimate non-discriminatory justification for taking the disputed employment action, the burden shifts back to the employee to provide evidence showing that the employer's proffered reason is a pretext for discrimination. Id. An employee may demonstrate pretext by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief. Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1112 (10th Cir. 2001).

Stover v. Martinez, 382 F.3d 1064, 1070 (10th Cir. 2004)

A prima facie case of Section 704 retaliation is initially made by showing, 1) protected opposition to discrimination, 2) an adverse employment action; and, 3) a causal connection existing between the protected activity and the adverse employment action. Miller v. Auto Club of New Mexico, Inc., 420 F.3d 1098, 1119-1120 (10th Cir. 2005). See also Clark County School District v. Breeden, 532 U.S. 268, 272 (2005), (saying that one must show

existence of a "causal connection" between protected activity and adverse employment action). If such is shown, the burden shifts to the defendant to "articulate" a non-discriminatory reason for its action. If such a showing is made, the plaintiff must show that the reason articulated is pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Federal courts considering summary judgment motions in civil rights retaliation cases, under the "Celotex Trilogy", have engaged in much discussion of which specific facts need to be shown by the non-moving party to demonstrate motive and intent leading to a "causal connection" between "protected activity" under Title VII and "adverse employment action." This has occurred in the context of courts endeavoring to determine whether a "reasonable jury" could find a "causal connection" between "protected activity" and "adverse action", given that this court has said that the trial court's role in ruling on a pre-trial Rule 56 Motion for Summary Judgment is the same as it is in ruling on a Motion for Judgment as a Matter of Law during trial under Rule 50(a)(1) F.R.Civ.P. Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986). See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Thus, in Civil Rights cases, the courts have, over time, identified certain discrete "facts" which give rise to a formulaic inference of retaliatory motive and intent justifying the denial of summary judgment. Conversely, if certain discrete identified "facts" may militate against a claim of retaliation, those discrete facts are identified by the courts as leading to an inevitable finding that "no reasonable jury" could find that discrimination took place, mandating that summary judgment be entered. This leads to what one commentator calls the "Balkanization"

of the evidence, and a discounting of the totality of the circumstances and "all of the facts", in favor of segregating certain patterns of proof that, perforce, necessitate the granting or denial of summary judgment. Spriggs, supra, §29.01.(2).

Two important themes in the quest for substantial evidentiary "proof" in summary judgment proceedings involving motive and intent in retaliation cases are "timing" and "knowledge", both of which were involved in this case. See Spriggs, Kent, Representing Plaintiffs in Title VII Cases, §7.04(7), pp. 7-91 through 7-97. One factual formulae seeks to draw an inference of discriminatory animus; while the other purports to show inference of no discriminatory animus.

In retaliation cases, it is said, "timing is everything" and the sequence of events is often pivotal. Spriggs, supra, pp. 7-91. In the Tenth Circuit a protected employment activity followed by adverse employment action "very close" to the protected activity has been deemed sufficient evidence to show motive and intent and causal connection. O'Neal v. Ferguson, 237 F.3d 1248, 1253 (10th Cir. 2001). In a summary judgment case, the Tenth Circuit found that five months between protected activity and adverse action was also sufficiently proximate to show causal connection. Wells v. Colorado Dept. of Transportation, 325 F.3d 1205 (10th Cir. 2003). But, in Candelaria v. EG&G Energy, 33 F.3d 1259, 1262 (10th Cir. 1994), the same court held that three years was not close enough to raise such an inference. Yet, in another circuit, in Brumback v. Callas Contractor, 913 F.Supp. 929, 942 (D.Md. 1995), a district court ruled that five months between knowledge of protected activity and a purported "layoff" was deemed sufficient to support an

inference of causal connection. In Clark County School District v. Breeden, supra, 532 U.S. p. 273, this court acknowledged temporal proximity as probative of motive if it is "very close", citing O'Neal, supra.

In reviewing the cases in which temporal proximity has been advanced as evidence of sufficient motive and intent to show causal connection, it is important to recognize that it is causation in the form of intangible motive and intent that must be shown, not merely extant temporal proximity. Temporal proximity, the courts have held, provides evidentiary basis from which motive and intent can be inferred. Yet, many cases have recognized that the time span between protected activity and adverse action, whether "proximal" or "distal", is not determinative, especially when there has been continuous sequence of events, sometimes referred to as "a continuous barrage of adverse action", Robinson v. Southeastern Pa Transportation Authority, Red Arrow Div., 982 F.2d 892, 895 (3rd Cir. 1993). Nevertheless, temporal proximity has been latched on to by the courts as a "fact" which would justify an inference of causal connection.

The other recurrent theme of cases which dispose of civil right retaliation claims is "knowledge". Many courts have said that showing evidence of "knowledge" of the protected activity is essential to avoid summary judgment in retaliation claims. However, again under the rubric of the "Celotex Trilogy", the courts have engaged in fact-finding determinations in order to grant or deny summary judgment. Some cases ignore evidence of institutional retaliatory intent to grant summary judgment based upon discrete evidence of "lack of knowledge" providing requisite "deniability" to avoid

liability. See e.g. Peterson v. Utah Dept. of Corrections, supra; and Luckie v. Ameritech Corp., supra. Other decisions impute "knowledge" to the institution based upon delegated authority from one with animus to one without animus, based upon a "cat's paw" theory of liability, (see Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Gilbrook v. City of Westminster, 177 F.3d 839, 853-855 (9th Cir. 1999). Still another line of cases has found that liability could attach in the form of "taint" where an employee would not have been subject to ultimate adverse employment action absent earlier adverse employment action motivated by unlawful animus. See Haas v. Advosys., Inc., 168 F.3d 733 (5th Cir. 1999); Dey v. Colt Construction, 28 F.3d 1446, 1459 (7th Cir. 1994); Roebuck v. Drexel University, 852 F.2d 715, 727 (3rd Cir. 1988); Simpson v. Diversitech General, Inc., 945 F.2d 156 (6th Cir. 1991); Griffin v. Washington Convention Center, 142 F.3d 1308, 1312 (D.C. Cir. 1988).

In petitioner's case, there was evidence of causal connection, in the form of both "temporal proximity' and "knowledge". Such was evidenced by the two-day Board hearing where testimony showing protected activity, adverse action one day after the no-cause letter, a protracted but continuous sequence of retaliatory action in the form of onerous "remediation plans", and evidence of pretext in the grounds for termination which were concocted to complete the "task" of terminating the petitioner. Yet, the lower courts granted and upheld summary judgment on evidence that a single player in the scenario, the Faculty Supervisor, did not know Brenda Boynton had personally spoken to the President of the College about her supervisor's hostile conduct.

III. IN PRACTICE, THE "CELOTEX TRILOGY", AS APPLIED TO CIVIL RIGHTS CASES, INFRINGES COMPLAINANTS OF THEIR RIGHT TO A JURY TRIAL.

This case presents the important and recurring problem of Summary Judgment procedure degrading the Seventh Amendment right to a jury trial, from its historic dimensions, in Title VII Civil Rights cases where determinations regarding intention and motive are particularly unsuitable for summary adjudication. Wright, Miller, and Kane, Federal Practice and Procedure, §2732.2 at 152-153 (1999). It reflects the conflicting decisions that have been reached by courts who have considered summary judgment motions in civil rights retaliation cases under the rubric of the "Celotex Trilogy" since the Civil Rights Act of 1964, as amended in 1991, permitted jury trials. (42 USC §1981a(c)) This court's decision to grant certiorari to resolve conflicting and confusing case law among the circuits concerning prima facie evidence in summary judgment proceedings, where motive and intent are at issue, will be important to thousands of people who seek redress for job discrimination in view of the substantial number of civil rights cases being decided without trial on summary judgment.[2]

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[2]See Kevin M. Clermont and Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, Vol. I, Journal of Empinical Legal Studies, 429-458 (2004); Martin H. Redish, Summary Judgment and the Vanishing Trial, 57 STAN. L. REV., 1329-1361 (2005).

Since the Supreme Court's "Celotex Trilogy" of cases, which eased the standards for granting summary judgment, summary judgment has increasingly been the procedure of choice for resolution of employment discrimination cases under Title VII of the Civil Rights Act of 1964. Particularly after the 1991 amendments to the Civil Rights Act of 1964 permitted jury trial in Title VII cases, summary judgment appears to be the predominant, or even preferred, method of disposition in civil rights cases. "[A]ny reader of the Federal Reporter must notice that courts routinely grant summary judgment against civil rights claims." Brunett, Redish and Reiter, Summary Judgment Federal Law and Practice, Second Edition, §9.13 (2000), p. 297. "[P]atterns have evolved in which it is clear that some courts of appeal are much more hostile to summary judgment for employers than others. Among the most hostile are the Second and Third Circuits. Among the most accepting are the Fourth, Fifth, and Tenth." Spriggs, Kent, Representing Plaintiffs in Title VII action, §29.01[1], p. 29-6. Though many courts have said that most civil rights cases are "unsuitable" for summary judgment, in cases where motive and intent are in question, such admonition is more honored in its breach than in the observance thereof.

> Purely as an empirical matter, it is clear that summary judgment is often sought and frequently granted in civil rights cases. A Federal Judicial Center Study revealed that the percentage of employment discrimination cases using summary judgment is higher than that used in cases categorized as contract, tort, or miscellaneous. The Administrative Office of the United States Court reported that in 1995, 90 percent of

> employment discrimination cases were decided without a trial. Some commentators laud this trend and others criticize it. Judge Posner describes this trend as part of a problem of increased caseload. In his terms, "[T]he expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial.

Brunett, Redish and Reiter, Summary Judgment Federal Law and Practice, Second Edition, §9.13 (2000) p. 299, quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997).

A number of commentators, treatises, and federal judges have recognized the distinct trend among the federal courts to dispose of civil rights cases on summary judgment despite the unique nature of such cases where motive and intent are central issues. Judge Weinstein, warning against this trend, wrote in Gallagher v. Delaney, 139 F.3d 338, 342-343 (2nd Cir. 1998):

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street. . .
>
> The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-

> economic spectrum, generally lacking the current real-life experience in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications....
>
> The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases....
>
> In this period of rapidly changing and conflicting views of appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment.

Judge Posner of the Seventh Circuit has also put it in clear terms:

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified (so far as the Seventh Amendment permits) to bring federal practice closer to the practice in the legal systems of Continental Europe, where there is no hard and fast line between pretrial and trial and where procedure is more summary and informal than in the United States. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997).

CONCLUSION

For the reasons stated, the Court should grant a Writ of Certiorari.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 04-8126
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENDA BOYNTON,
Plaintiff-Appellant,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant-Appellee.

November 29, 2005, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For BRENDA BOYNTON, Plaintiff-Appellant: Bernard Q. Phelan, Cheyenne, WY.

For WESTERN WYOMING COMMUNITY COLLEGE, Defendant-Appellee: Patrick E. Hacker, Cheyenne, WY.

JUDGES: Before TACHA, Chief Circuit Judge, ANDERSON and KELLY, Circuit Judges.

OPINIONBY: Stephen H. Anderson

OPINION: ORDER AND JUDGMENT *

Brenda Boynton appeals the grant of summary judgment to defendant, Western Wyoming Community College ("WWCC"), in her Title VII, 42 U.S.C. §§ 2000e through 2000e-17, action alleging that her termination from employment at WWCC was in retaliation for her complaint of sexual harassment. We affirm.

Boynton was hired by WWCC as a full-time custodian at WWCC's Rock Springs campus on December 1, 1997. n1 WWCC concedes there was no dispute that she performed satisfactorily in that position. Appellee's Br. at 3. Her supervisor was WWCC employee Gary Bussart. On August 10, 1998, Boynton was promoted to the position of Maintenance/Custodian at WWCC's Green River facility, a position involving more substantial duties and a higher rate of pay.

Following this promotion, Bussart continued to supervise Boynton. Boynton initially received satisfactory evaluations in her new job, with notations that she was learning a new position and that improvement with time was expected in certain areas, such as her productivity and her communication with others. When Boynton became pregnant, she was permitted to take maternity leave.

In September 2000, shortly before her return to work following her maternity leave, Boynton met with WWCC President Tex Boggs, alleging that Bussart had sexually harassed her more than two years earlier, when she had still been working at the Rock Springs campus. Boynton alleged that, on two occasions while she was working at the Rock Springs campus, Bussart

had inappropriately entered restrooms where Boynton was. Boynton further alleged that, after her transfer to the Green River Center, Bussart had made negative comments to her about her pregnancy and about women working, that he had asked her repeatedly when her baby was due, and that he had telephoned her at home while she was on maternity leave. She also alleged that he "disturbingly seemed to 'hover' over me and follow me around while I performed my duties." Boynton Aff. at P8, Appellant's App. at 22.

Boggs requested that the Dean of Administration, Marty Kelsey, join himself and Boynton to discuss Boynton's allegations. Kelsey was instructed to investigate the claims. He accordingly had a meeting with Boynton to gather information about her complaint and he interviewed others who might have relevant information. When interviewed by Kelsey, Bussart denied that the bathroom incidents or other incidents had occurred, and stated that he telephoned Boynton at home while she was on maternity leave to tell her that the locks had been changed on the Green River Center doors and that she would need to get new keys to get in upon her return. Boynton had told Kelsey that various other employees were aware of the incidents, but those employees told Kelsey that they were, in fact, completely unaware of such incidents. Kelsey also interviewed Mary Ann Huebner, the director of the Green River Center, inquiring whether she was "aware of any inappropriate behavior on [Bussart's] part at the Green River Center" without describing Boynton's complaint to her. Kelsey Dep., Appellant's App. at 82. Kelsey testified that he "did not go into all of these allegations" with Huebner, but rather just asked her "some general questions." Id. at

84 Huebner indicated she was unaware of any inappropriate behavior by Bussart.

After completing his investigation, Kelsey wrote to Boynton on October 9, 2000, informing her that he had found no evidence substantiating her allegations. He stated that he "would be happy to visit with you again about these matters if you can bring some concrete evidence into the conversation." Memorandum, Appellant's App. at 98. Boynton never provided any further information to Kelsey or anyone else at WWCC.

During this time, Bussart followed up on the concerns relating to communication and productivity. Bussart received complaints from other employees at the Green River Center concerning communication problems and Boynton's failure to complete tasks. On October 10, 2000, Boynton received her scheduled annual evaluation. While her overall evaluation was satisfactory, in one of five subcategories ("communication") she was rated as "marginal." Id. at 107.

In March 2001, Boynton received an evaluation ranking her performance as unsatisfactory. Bussart established a remediation plan to address these concerns. While remediation was ongoing, Boynton filed a complaint on June 25, 2001, with the Wyoming Department of Employment ("WDE") and with the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been denied a more favorable work assignment and that she had been harassed and suffered discrimination because of her gender and her pregnancy, and that she had suffered retaliation because she had reported sexual harassment. This complaint was eventually

dismissed, because the WDE concluded there was no reasonable cause to believe that WWCC had discriminated against her. The EEOC adopted the WDE's findings as its own and issued a 90-day right to sue letter. Boynton did not appeal this ruling, nor did she act upon the right to sue letter.

Meanwhile, Boynton continued to receive unsatisfactory evaluations. Accordingly, following an unsatisfactory evaluation in July 2001, Bussart recommended to Boggs that Boynton be terminated. In accordance with WWCC policy, Boggs invited Boynton to meet with him to discuss the recommendation and to respond to Bussart's evaluation and recommendation. Boggs decided not to terminate Boynton. He also determined that Huebner should be Boynton's supervisor, rather than Bussart. Huebner wrote a remediation plan, dated September 13, 2001, to assist Boynton in performing her job satisfactorily.

On February 28, 2002, Boynton received an evaluation again ranking her performance as unsatisfactory. Huebner designed another remediation plan, and Boynton's performance was evaluated again on May 28, 2002. Huebner again evaluated her performance as unsatisfactory. Huebner met with Boynton, told her that her performance was not improving, and said that she had no real choice but to terminate Boynton. Boynton never mentioned discrimination or retaliation during this meeting.

Following Huebner's recommendation that Boynton be terminated, Boggs provided Boynton with a pre-termination notice listing the reasons for the proposed termination and offered to meet with her to discuss

them. During their meeting, Boynton did not raise any claim of discrimination, nor did she suggest that she thought her termination was in retaliation for her complaints about Bussart. Boggs determined that good cause existed for Boynton's termination, and he so recommended. Boynton continued to work, while Boggs' recommendation of termination was addressed by the WWCC Board of Trustees, until she was suspended with pay effective October 29, 2002.[2]

The Board hired an independent hearing officer, a retired state district court judge, who conducted a hearing, created a record, and provided advisory findings of fact and conclusions of law to the Board. Boynton was represented by counsel before the hearing officer. The Board then reviewed all the materials created by the officer and issued its final decision on February 13, 2003, in which it upheld Boynton's termination.

Boynton filed a second complaint with the EEOC, alleging an incident involving Bussart and claiming that her termination was in retaliation for her complaint about sexual harassment. The EEOC again rejected her claim and issued a right to sue letter. This action was filed on the ninetieth day after the issuance of the 90-day right to sue letter.

Boynton initially included within this action claims for discrimination and hostile work environment against Boggs and Bussart, as well as WWCC. When WWCC moved for summary judgment on all claims, Boynton essentially conceded that summary judgment in favor of Boggs and Bussart was proper, as well as summary judgment for WWCC on the discrimination claims,

leaving only her claim that WWCC terminated her in retaliation for her September 2000 allegation of sexual harassment.

The district court granted summary judgment to WWCC on Boynton's remaining claim, concluding:

there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September of 200[0] and her termination, which ultimately became effective in 2003. All of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties. She had been on three separate remediation plans and failed to meet her supervisor's expectations for improved performance. She had numerous opportunities to improve; she did not do so. It is clear that WWCC offered legitimate, nondiscriminatory justifications for its decision to terminate Boynton's employment at WWCC.

Order at 24-25, Appellant's App. at 149-50. The court further concluded that Boynton "has not carried her burden of proof that the defendant WWCC is entitled to summary judgment as a matter of law on her claim of retaliation in violation of Title VII." Id. at 152.

Boynton appeals, arguing the district court erred in granting summary judgment to WWCC because genuine issues of material fact exist regarding (1) the causal connection between her protected activity and her termination; and (2) whether WWCC's proffered reasons for her termination were pretextual.

We apply the following familiar and well-established standard of review:

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof. The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is "genuine"; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.

Garrison v. Gambro, Inc., 428 F.3d 933, 150 Fed. Appx. 819, 2005 U.S. App. LEXIS 21765, No. 04-1409, 2005 WL 2982279, at *1 (10th Cir. Nov. 8, 2005) (quoting Fed. R. Civ. P. 56(c)) (further quotation omitted).

To establish a *prima facie* case of retaliation under Title VII, "a plaintiff must demonstrate that (1) she was engaged in protected opposition to discrimination; (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action." *Miller v. Auto. Club of New Mexico*, 420 F.3d 1098, 1119 (10th Cir. 2005). Once the *prima facie* case is established, "the burden shifts to the employer to offer a facially legitimate rationale for the adverse action. The burden then shifts back to the plaintiff to show the employer's explanation is pretext." *Id.* at 1120.

The district court concluded that Boynton failed to establish a *prima facie* case because there was an insufficient causal connection between her complaint of discrimination and/or harassment and her termination several years later. The court also determined that Boynton failed to demonstrate that WWCC's reasons for terminating her were pretextual. We agree, for substantially the reasons set forth in the district court's order granting summary judgment.

We accordingly AFFIRM the district court's order granting summary judgment to WWCC on Boynton's Title VII claim.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 An accurate recitation of the facts in this case, in particular the dates when specific incidents occurred, has been made more difficult than usual because neither party accurately and completely described the sequence of events.

n2 Boggs sent Boynton her termination letter on August 1, 2002, which Boynton appealed on August 12, 2002. On October 24, 2002, Boynton was suspended without pay by Huebner for twenty-four work hours for insubordination, refusal to follow legal instructions, and gross neglect of duty, in connection with an incident in which Boynton refused to clean up mouse droppings from Huebner's desk, despite Huebner's specific directive to do so. On October 29, she was suspended with pay, and relieved of her duties, because she was overheard making what was believed to be a threat against Huebner.

Filed 12/3/04
No. 04-CV-016-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
BRENDA BOYNTON,
Plaintiff,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment and the plaintiff's response in opposition to the motion, and the defendants' further reply have come before the Court for consideration, having been submitted to the Court on the parties' written submissions. The Court, having reviewed the motion and response, the materials submitted in support of the parties' respective positions, the pleadings of record, the applicable law, and being fully advised in the premises, FINDS and ORDERS as follows:

1. Summary judgment shall be granted in favor of defendants on all claims asserted against then, consistent with the representations in the parties' briefs and the representations to the Court at the final pretrial conference, conceding that the sole surviving claim in this litigation was plaintiff's claim that the 2003 termination was in retaliation for her September 2001 complaint to President Boggs. On that basis, summary

judgment will be granted in favor of defendants on all claims asserted by plaintiff in her complaint, including her retaliation claim against defendant western Wyoming Community College, which will be addressed in more detail in the following portions of this Order.

2. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Allen v. Muskogee, Oklahoma, 119 F.3d 837, 839-840 (10th Cir. 1997). A disputed fact is material if it might affect the outcome of the suit under governing law. The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The factual record and reasonable inferences therefrom are construed in the light most favorable to the nonmovant. Id., quoting Anderson v. Liberty Lobby, Ind., 477 U.S. 242, 248 (1986) and Gullickson v. Southwest Airlines Pilots' Assoc., 87 F.3d 11761 1183 (10th Cir. 1996). The moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment, but instead bears the initial burden of showing -- that is, point out to the district court -- that there is an absence of evidence to support the nonmoving party's case. Id., quoting Celotex Corp. v. Catrett, 377 U.S. 317, 325.

3. Background: Plaintiff Brenda Boynton ("Boynton") was hired by western Wyoming Community College ("WWCC ") as a full time Custodian II at the Rock Springs campus on December 1, 1997. She was promoted August 10, 1998 to the position of Maintenance/ Custodian at the Green Rivėr campus. The new position at the Green River Center involved additional duties, including building security, plowing

and sanding entrance and parking areas, and interacting with instructors and the public to set up roams for functions. Plaintiff received an increase in pay. After her reassignment, Boynton continued to be supervised by the same supervisor, Gary Bussart, who has now been dismissed from this action as a defendant. Plaintiff was initially given a satisfactory evaluation in her new position, with notations that she was learning the position and improvement with time was expected in certain areas, including productivity and communications with others.

Boynton became pregnant and was allowed to take maternity leave. After the end of her leave, she requested another week off as vacation to go hunting. Bussart denied this request.

In September 2001, Boynton net with College President Tex Boggs to assert sexual harassment complaints that she wanted to bring up before she returned to work. Her complaint related incidents that had occurred throe years earlier in 1998 while she was working as an employee on the Rock Springs campus. She complained Bussart had entered restrooms on two occasions, describing those two incidents to President Boggs. She also asserted Bussart had made negative comments about women working, that he had repeatedly asked her regarding the baby's due date, and that while she was on leave he had telephoned her at home. She also complained that he also watched her while she was performing cleaning tasks a couple of times, but did not allege he had made any sexually suggestive comments or touched her.

President Boggs requested the Dean of Administration, Marty Kelsey, to join him and Boynton to discuss Boynton's concerns. Kelsey was instructed to investigate; he had a subsequent meeting with Boynton to gather information regarding the particulars of her complaint; he interviewed anyone who might possibly have knowledge of Boynton's allegations. Bussart denied Boynton's allegations when asked about them by Kelsey, indicating that he had telephoned her at home to inform Boynton locks had been changed and she would need to get nevus keys in order to gain entrance of the building when she returned. Bussart denied the remainder of Boynton's allegations.

Boynton stated she had complained about Bussart to Rich Matthews, Bussart's supervisor. To Kelsey, Matthews denied that she had ever talked to hire about Bussart and denied the conversation Boynton said she had had with Matthews. Kelsey also talked to another employee Boynton had referenced as having information, John Montz, but Montz had no information as to what Boynton might have been talking about. Kelsey also interviewed the director of the Green River Center, Mary Ann Huebner, regarding whether there had been any kind of complaint regarding incidents in bathrooms or otherwise, without revealing the existence of Boynton's complaint to President Boggs. Huebner had never seen or heard about anything inappropriate regarding Center.

Kelsey wrote to Boynton regarding the results of his investigation and indicated the matter could not be taken any further unless she would provide additional

information. Boynton never contacted Kelsey with any further information and she did not use any of WWCC 's procedures to pursue complaints of discrimination, retaliation, or any other concern.

Because the stories of Boynton and Bussart were in conflict, the college determined that no further action could be taken without further information. After Boynton's complaint to President Boggs regarding her concerns about Bussart, WWCC determined that her supervisor should be changed and Mary Ann Huebner, the director of the Green River Center, became Boynton's immediate supervisor. Over a period of time in her employment with WWCC and under Huebner's direct supervision, Boynton was subject to several remediation plans designed to address perceived deficiencies in her work. After a period of time and a fourth unsatisfactory evaluation, on May 28, 2002 Huebner recommended that plaintiff be terminated.[1]

On this occasion, following Huebner"s recommendation that Boynton be terminated, President Boggs provided Boynton with a pre-termination notice listing the reasons for the proposed termination and offered to meet with Boynton to allow her to respond. She accepted that offer. During that meeting, Boynton did not raise any issues or complaints of discrimination or retaliation. Based upon the information and documentation that had been provided to him, upon appropriate review, Boggs determined good cause existed for termination and made a recommendation of termination Boynton appealed President Boggs' determination pursuant to existing college policy.

While the termination was pending, an incident

occurred where Boynton was instructed by Huebner to clean mouse droppings off Huebner's desk. Boynton did not do so and insisted that Huebner remove everything from her desk before she would clean it, although Huebner specifically instructed her and gave her permission to clean the desk. Huebner suspended Boynton without pay for a period of 24 hours (three 8-hour shifts) for insubordination.

Another incident occurred thereafter in which Huebner was informed that Boynton had made a comment to another employee that "bullets will fly," presumably in reference to Boynton's ongoing dispute with college administration. Boynton denied she said this and instead says that she said "words will fly." Huebner considered the comment a threat and notified the police. Boynton was suspended with pay effective October 29, 2002, pending the outcome of her hearing. She was suspended with pay and benefits from October 29, 2002 until Findings of Fact and Conclusions of Law were entered on February 13, 2003 in which the final decision to terminate Boynton's employment was made by the Board.

Boynton filed complaints regarding discrimination and retaliation allegations with the Wyoming Department of Employment and the EEOC, with the first filed June 25, 2002. All of her allegations related to issues pertaining evaluations. WWCC disputed Boynton's claims and responded. After investigating, October 10, 2002, the Wyoming Department of Employment dismissed the claim, concluding there was no reason to conclude the college had engaged in discriminatory or retaliatory acts detrimental to Boynton. The EEOC adopted the State of Wyoming's findings as its own

and issued a 90-day right to sue letter. Boynton did not file suit, and explained at her deposition she had intended the process to be some sort of a warning to the college. It is undisputed she received the right to sue letter and did not sue within the required time.

Boynton received a full due process hearing on whether good cause existed for termination and whether the decision to terminate her employment with WWCC was grounded in sex discrimination or retaliation An independent hearing officer was appointed to conduct the hearing and make recommended findings of fact and conclusions of law. The hearing, where Boynton was represented by counsel, took two days and was reported Both sides submitted proposed Findings of Fact and Conclusions of Law. After the hearing, the Board received the transcript and exhibits, the recommendations of the independent hearing officer and the proposed findings and conclusions of the parties. It also had separate legal counsel to assist them. The Board eventually entered Findings of Fact and Conclusions of Law upholding the termination. Boyntan did not appeal or seek judicial review of the administrative decision.

After Boyntan was terminated, she filed another EEOC claim alleging an incident regarding Bussart and that her termination was in retaliation for her complaint about alleged sexual harassment. The EEOC rejected the claim and issued a right to sue letter. This action was filed on the ninetieth day from issuance of the right to sue.

As noted earlier, the only remaining claim being asserted by plaintiff in this litigation is her retaliation

claim, which will now be discussed.

4. Under applicable federal law, there are three elements for a retaliation claim:

"(1) [the plaintiff] engaged in protected opposition to discrimination; (2) [the plaintiff] suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001).

Peterson v. Utah Dept. of Corrections, 301 F. 3d 1182, 1188 (10th Cir. 2002).

5. The Court finds that plaintiff has not established a viable retaliation claim. The Court will assume, only for purposes of this Order, that Boynton has satisfied the first two prongs: that she engaged in protected opposition to discrimination and that she suffered an adverse employment action. In September 2001, she did bring her complaints to President Boggs regarding Bussart and the alleged sexual harassment. She was also terminated from her employment at WWCC. However, she fails entirely to satisfy the third prong and has not carried the burden of proving a causal connection between the protected activity and the adverse employment action.

As noted by the Tenth Circuit, it is crucial that Boynton's supervisor knew of her engagement in protected opposition. Id. at 1188.

An employer's action against an employee cannot be because of that employee's protected opposition unless

the employer knows the employee has engaged in protected opposition. See .Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993) ("plaintiff must show that the individual who took adverse action against him knew of the employee's protected activity"); Gallagher v. Kleinwort Benson Gov't Sec., Inc., 698 F. Supp. 1401, 1405-07 (N.D. Ill. 1988) (complaint of unequal pay did not suggest gender discrimination). As a result, retaliation against Petersen would be prohibited by § 20OOe-3(a) only if the superior retaliating against her knew that her opposition to Tansy's treatment of Mooney was motivated by a belief that he was engaging in racial or religious discrimination.

We believe that this result is compelled not only by the natural reading of the statutory language, but also by the purpose of the provision. The purpose of § 2000e-3(a) is to let employees feel free to express condemnation of discrimination that violates Title VII. That purpose is hardly served by imposing sanctions upon employers who take action against employees who never communicate their concern about unlawful discrimination.

We can now readily dispose of Petersen's Title VII retaliation claim. To overcome the UDOC motion for summary judgment, Petersen needed to produce evidence that both (1) the UDOC took adverse employment action against her and (2) the motive for the adverse action was her opposition to Tansy's racial or religious discrimination against Mooney. She failed to meet her burden.

To begin with motive, Petersen testified that on March 7, 1997, Tansy called her a liar, announced that her

"days are numbered," and threatened to take her "out of the information loop" At that time, however, Petersen had not communicated to anyone her belief that Tansy had discriminated against Mooney on racial or religious grounds. Tansy was expressing his anger at Petersen for complaining of his treatment of Mooney, but her complaint was not, as far as he knew, protected action under Title VII. Thus, his retaliation would not violate § 2000e-3(a).

To establish a Title VII retaliation claim, Petersen would need to prove that when Tansy allegedly followed through on his threats against Petersen, he not only had this lawful retaliatory motive but was additionally motivated by his learning later that Peterson had complained of his discrimination against Mooney on religious or racial grounds. See Hawkins v. PepsiCo, Inc., 203 F.3d 274, 281 (4th Cir. 2000) (plaintiff produced no evidence to show that disparate treatment by supervisor was due to race rather than supervisor's "admittedly low regard" for plaintiff's job performance). But Petersen presented the district court with absolutely no evidence of such an additional motive. Nor is there evidence that any of Petersen's other superiors had an unlawful retaliatory motive. On the contrary, Petersen's testimony indicates that each time she asserted that Tansy had engaged in racial or religious discrimination, her superiors received the charge sympathetically. Petersen's failure to provide evidence of an improper motive for alleged retaliation would in itself require judgment against her.

Peterson v. Utah Department of Corrections, 301 F. 3d at 1188-1189. There is no evidence whatsoever that

Huebner, the decision maker recommending Boynton's termination, knew of Boynton's September 2001 complaints to President Boggs.

6. The Seventh Circuit has expressed an analysis similar to that employed in the Tenth Circuit:

An employer may not retaliate against an employee who has complained about discrimination or other practices that violate Title VII. 42 U.S.C. § 2000e- (a); Sitar v. Ind. Dept of Transp., 344 F.3d 720, 727 (7th Cir. 2000). Luckie argues that Ameritech retaliated against her by placing her on a PIP [performance improvement plan] and later terminating her employment because she contacted the EEO hotline to complain about Patterson and hired an attorney who sent letters to Ameritech alleging racial discrimination.

A plaintiff has two distinct ways of establishing a prima facie case for unlawful retaliation: the direct method and the indirect method. Stone v. City of Indianapolis Public Util. Div., 281 F. 3d 640, 644 (7th Cir. 2002). In order to survive summary judgment under the direct method, Luckie must present direct evidence that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the two. Haywood v. Lucent Tech. Inc., 323 F. 3d 524, 531 (7th Cir. 2000). Alternatively, under the indirect method, Luckie must establish that: (1) she engaged in statutorily protected activity; (2) she was performing her job according to Ameritech's legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did

not engage in statutorily protected activity. Williams, 361 F.3d at 1031; Stone, 281 F.3d at 644.

Luckie contends that Patterson placed her on a PIP and later fired her in retaliation for her complaints to the EEO office and for hiring an attorney who sent letters to Ameritech which complained of harassment by Patterson. Luckie's claim fails under the direct method because she cannot prove a causal connection between her complaints and her termination. The key inquiry in determining whether there is a causal connection under the direct method is whether Patterson was aware of the allegations of discrimination at the time of her decisions to place Luckie on a PIP and terminate her employment; absent such knowledge, there can be no causal link between the two. Maarouf v. Walker Mfg. Co., 210 F.3d 750, 755 (7th Cir. 2000). It is not sufficient that Patterson could or even should have known about Luckie's complaints; she must have had actual knowledge of the complaints for her decisions to be retaliatory Potter, 310 F. 3d 979, 982-83 (7th 2002), Miller, 203 F.3d at 1008 ("an employer cannot retaliate when it is unaware of any complaints"). At minimum, therefore, Luckie must offer evidence that would support a reasonable inference that Patterson was aware of Luckie's allegations of discrimination. Dey v. Colt Const. Dev. Co., 28 F.3d 1446, 1458 (7th Cir. 1994). Even in the light most favorable to her, there is simply no evidence in the record that would support such an inference. Mamie Clay has testified that she did not discuss Luckie's allegations with Patterson; in fact, she states that the two have not met or even spoken. Patterson asserts that she didn't know about Luckie's complaints at the time she made the decision to

terminate her employment. Furthermore, it is the stated policy of Ameritech's EEO department to protect the confidentiality of any employee who complains about discrimination. There is nothing in the record that refutes either Clay or Patterson's statements, nor explains why Clay would deviate from the confidentiality policy of the EEO department. Similarly, there is no evidence that Patterson knew about the letters sent in September from Luckie's attorney. The sole evidence on which Luckie relies is that Deborah Ingram of Ameritech's EEO department asked Patterson for information about the credit card balance history of her employees. Notably, the credit card inquiry was regarding all of Patterson's employees, not just Luckie. A such, Patterson would have no reason to know that Ingram's request for information was in response to a claim of discrimination by Luckie, as opposed to any of her other employees. Lacking a causal connection, Luckie's claim fails under the direct method.

Proceeding to the indirect method, the district court correctly found that Luckie failed to establish a prima facie case because she was not performing her job according to Ameritech's legitimate expectations at the time she was fired The record unambiguously reflects that Luckie had performance problems before she was placed on a PIP, and that these performance deficiencies were noted by ether managers besides Patterson. Ameritech has further shown that Luckie failed to correct these problems while on the PIP. Luckie continued to miss deadlines, the quality of her work product was unacceptable, and she was often inaccessible during work hours. Luckie's only response is that she had received positive performance

evaluations in the past. However, the fact that Luckie may have met expectations in the past is irrelevant; she must show that she was meeting expectations at the time of her termination. Peters v. Renaissance Hotel Operating Co., 307 F. 3d 535, 545 (7th Cir. 2002). By failing to establish this element of the prima facie case, Luckie's claim cannot withstand summary judgment under the indirect analysis.

Luckie v. Ameritech Corp., 2004 WL 2633287, *4-*5 (7th Cir. 2004).

7. In this case, there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September of 2001 and her termination, which ultimately became effective in 2003. All of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties. She had been on three separate remediation plans and failed to meet her supervisor's expectations for improved performance. She had numerous opportunities to improve; she did not do so. It is clear that WWCC offered legitimate, nondiscriminatory justifications for its decision to terminate Boynton's employment at WWCC.

Where the employer has provided a legitimate, non-discriminatory justification for an employment action, the burden shifts back to the employee to provide evidence shoving that the employer's proffered reason is a pretext for discrimination. Stover v. Martinet, 382 F.3d 1064, 1071. "An employee may demonstrate pretext by shoving the employer's proffered reason was so inconsistent, implausible, incoherent, or

contradictory that it is unworthy of belief." Stover v. Martinet, 382 F. 3d at 1071, citing Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1120 (10th Cir. 2001). Temporal proximity between protected activity and the adverse action may, in certain instances, support an inference of causation However, in this case, the three year period between Boynton's complaints to President Boggs regarding Bussart's alleged sexual harassment and her termination, which had been recommended by her immediate supervisor, Huebner, and acted upon by the Board after a full hearing, is unquestionably insufficient to support any inference of causation. Thus, Boynton must provide other evidence of retaliatory motive if her claim is to survive summary judgment.

Boynton has provided no evidence whatsoever as to retaliatory motive other than her own speculation and belief to support her claim of retaliation. Her own subjective opinions are not sufficient. Stover v. Martinez, 382 F.3d at 1072. As in Petersen v. Utah Department of Corrections, 301 F.3d 1182, 1191 (10th Cir. 2002), this record in this case is "replete with general claims of retaliation but no specifics." Boynton offers no evidence that she was in fact complying with the employer's expectations of improved job performance pursuant to the numerous remediation plans. In fact, as her own deposition testimony demonstrates, Boynton appears to have had substantial disdain for the authority of her supervisor and demonstrated a non-compliant, defiant attitude unquestionably detrimental to her future employment prospects at WWCC.[2] It is no wonder she received poor evaluations and was eventually terminated.

8. After reviewing the parties' submissions and the applicable law, the Court finds that the plaintiff has not carried her burden of proof and that the defendant WWCC is entitled to summary judgment as a matter of law on her claim of retaliation in violation of Title VII.

Accordingly, it is therefore

ORDERED that the defendants' motion for summary judgment on all claims, including specifically plaintiff's claim of retaliation in violation of Title VII, shall be, and is, GRANTED. To the extent not specifically addressed herein, all other pending motions are DENIED AS MOOT.

Judgment shall be entered accordingly.

Dated this 3d day of December 2004.

UNITED STATES DISTRICT JUDGE

Footnotes

fn1Prior to this period, Bussart had recommended that plaintiff be terminated. This recommendation was rejected by President Boggs, who determined that Boynton had not been given sufficient information about her expected level of performance. Boggs determined that Boynton should be given additional time to do a better job and her employment with the college continued under a remediation plan designed to address the specific deficiencies in her work performance. It was in conjunction with this decision to reject the termination recommendation that Boggs

determined that, as part of a reorganization of duties in the Green River Center, Huebner, the site director, would assume direct supervision of the custodial and maintenance employees and would thus become Boynton's immediate supervisor. Bussart was removed from any supervisory authority over the Green River Center as of September 2001.

fn2 By way of example only, Boynton was advised to keep a log of her daily activities by her supervisor as part of her remediation plan. In her deposition, she admits that she kept the log on paper napkins, paper towels, or toilet paper and could not be bothered to find an alternative means of recording her activities and she "was not going to provide a notebook for them." Deposition at 157. This is in stark contrast to her deposition testimony indicating that she kept a notebook regarding her complaints, incidents and disputes with individuals at the college. In the log, for example, plaintiff notes that she is on a "pee break," recorded that between 9:09 and 9:14 she "readjusted bra strap (rt)" and between 6:12 and 6:16 pm January 16, "good healthy crap."

No. 04-8126
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENDA BOYNTON,
Plaintiff-Appellant,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant-Appellee.

1/6/06 Filed

JUDGES: Before TACHA, Chief Circuit Judge, ANDERSON and KELLY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

No. 05-1554

Supreme Court, U.S.
FILED
JUN 2 9 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENDA BOYNTON,

Petitioner,

v.

WESTERN WYOMING COMMUNITY COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Western Wyoming Community College respectfully requests the Court deny the Petition for a Writ of Certiorari in its entirety.

COUNTER STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Pursuant to Supreme Court Rule 15, Respondent provides this statement to correct inaccuracies in the Petition. The Petition misstates the record and the reasoning of the Tenth Circuit Court of Appeals and District Court for the District of Wyoming. The Petition's factual statement begins by confusing two different positions held by Petitioner and by blurring the timeline of events. Brenda Boynton was hired December 1, 1997 to work as a custodian at the Rock Springs, Wyoming, campus of Western Wyoming Community College (WWCC). During her time in *that* position, she received the favorable comments quoted in the Petition. On August 10, 1998, she was promoted to a new position of Maintenance/Custodian at a different campus in Green River, Wyoming. That position involved significantly different duties including building security, plowing and sanding the entrance and parking areas, and interacting with the public to set up rooms for specialized classes and functions. In the new position, Boynton was initially given satisfactory evaluations, with notations that she was learning a new job and that improvement with time was expected in certain areas, including productivity and communications with others. As early as October 10, 1998, nearly two years before Brenda Boynton first alleged sexual harassment,

her evaluation plainly stated that, "Brenda's communication skills do need to be improved." The theme that she needed to improve and was being given time to learn and meet the job standards was continued throughout her evaluations which predate the sexual harassment complaint which is the alleged basis of retaliation.

When Brenda Boynton became pregnant, she was permitted to take maternity leave. In September 2000, shortly before her return to work following maternity leave, Boynton met with College President Tex Boggs, and asserted that her supervisor, Gary Bussart, had sexually harassed her two years earlier when she had worked in her previous position in Rock Springs, Wyoming. Boggs immediately requested the Dean of Administration, Marty Kelsey, to meet with Boynton to discuss the accusations and investigate. Kelsey met with Boynton, and then interviewed all of the persons whom Boynton suggested might have knowledge. Bussart strongly denied the accusations. Other witnesses with whom Boynton claimed to have discussed the issue denied such conversations had occurred. Kelsey chose to go beyond the persons identified by Boynton to also inquire of the administrative director of the Green River Center, Mary Ann Huebner, as to whether she had ever observed any conduct on the part of Bussart that appeared questionable, or whether any complaints or concerns had been voiced about Bussart. Kelsey deliberately did not inform Ms. Huebner that Boynton had made a complaint, or that a sexual harassment complaint had been made.

Kelsey completed his investigation and on October 9, 2000 wrote a letter to Boynton explaining that Bussart had directly disputed her accusations, that the other witnesses she said she had spoken to about the matter had

no recollection of the conversations she claimed, and that he could not confirm the accusation. His letter invited Boynton to supply any other information she could so that he could investigate further, and noted that he had gone as far as he could go, based on the information he had received at that point. Boynton did not follow up further with Kelsey.

The Petition makes much of the timing of an evaluation received by Boynton on October 10, 2000. That evaluation included a rating of satisfactory overall, with satisfactory ratings in four of five evaluation subcategories, but a rating of "marginal" in the subcategory of communication. Petitioner's brief quotes two comments out of context regarding consulting her supervisor when she had questions, and the need to work together with other staff as part of a team. Those comments are virtually identical to comments made in evaluations which *predate* her complaint of harassment. The 1998 evaluation comments observed that "one of the weakest areas that really needs some improvement" is "communication with the Director of the GRC [Green River Center]," that she "also needs good communication with her fellow employees," and that "She also needs to participate in staff meetings." The evaluation was not markedly different from the previous evaluations. Brenda Boynton testified that she considered the earlier evaluations with the comments that she needed to improve communication and productivity, but was being given the benefit of the doubt while she learned the job, to be "borderline" evaluations. (Aplee. Supp. App. p. 40)

While the Petition emphasized that the October 10, 2000 evaluation is dated one day after the letter from Kelsey indicating he had been unable to determine

whether harassment had occurred, the Petition fails to explain that the timing of the evaluation was controlled by the fact that it was an *annual* evaluation due on a predetermined date, and that Boynton had chosen to make her complaint of the events allegedly occurring two years earlier, two weeks before the scheduled evaluation.

The Petition's summary of facts following the October 10, 2000 evaluation is incomplete and inaccurate. It is undisputed that during the period following the October 10, 2000 evaluation, supervisor Bussart received complaints from other employees at the Green River Center regarding Boynton's communications and failure to accomplish tasks. (Aplt. App. p. 61) In March of 2001, in accordance with College policy, Boynton was placed on an improvement plan designed to address the areas of concern. In June of 2001, supervisor Bussart recommended termination of Ms. Boynton. As provided by policy, President Boggs met with Boynton to review the recommendation and receive a response from her. Boggs found that the concerns regarding performance were significant, but he rejected the recommendation because he felt that the employee may not have been fully informed of the significance of the performance concerns.

President Boggs later reorganized the Green River Center, having the Center Director, Mary Ann Huebner, assume supervision of all custodians including Ms. Boynton, which eliminated Bussart from supervisory duties at the Green River campus. Boggs had previously worked closely with Ms. Huebner and considered her to be a nurturing supervisor. Huebner expressed her commitment to working with Brenda Boynton to help her succeed.

The Petition inaccurately asserts that the evaluations prepared during the time of Bussart's supervision were jointly "prepared by Bussart and Huebner." (Petition p. 10) There is nothing in the record to demonstrate that Huebner prepared the evaluations. Her role was that of Director of the Center. She simply sat in on the evaluation conference when Bussart met with the employee to outline job expectations, and did so because Boynton was performing those duties in the Green River Center.

Upon assuming responsibility for supervision of Boynton, Huebner met with her and developed a different plan of improvement aimed at addressing the areas of concern. At the end of six months, Huebner evaluated Boynton and found that her performance was deficient. Huebner noted her lack of communication with both administrators and fellow staff members, and failure to get the assigned work accomplished. Boynton had a number of excuses, particularly that she had not been properly trained. Because Huebner had not been the supervisor earlier and did not know if she had received proper orientation and training, she elected to establish another six-month plan of improvement, which included opportunity for training as well as direction regarding how to overcome ongoing issues of communication and productivity.

In the spring of 2002, Huebner met with Boynton, explained that Boynton had not met the plan and had actually gotten worse, and informed Boynton she had given Huebner no choice but to recommend termination. Huebner's recommendation to college President Boggs was based upon Boynton's performance during the period Huebner was supervisor. That recommendation went to President Boggs, who again invited Boynton to meet with

him to provide a response to Huebner's recommendation. Neither in any meeting with Huebner, nor with Boggs, did Boynton ever assert that her evaluations or the recommendation of termination were related to retaliation. Boggs noted that the issues first raised in the 1998 evaluation had not been resolved, but had gotten worse, and that the employee had been given multiple opportunities to improve. He recommended termination to the college Board of Trustees.

Brenda Boynton requested a formal hearing on the recommendation of termination as provided in college policy. The Board employed a retired state district court judge to act as an independent hearing officer to conduct a hearing and make a recommendation to the Board. While the Petition complains that none of the board members attended the hearing, that is exactly what is contemplated in the college's policy – an independent hearing conducted before an impartial hearing officer, separate from the Board.

The hearing process was conducted in accordance with Wyoming's statutory Administrative Procedures Act, which requires full trial-type proceedings, including representation by legal counsel, a right to discovery, subpoenas for witnesses, proceedings transcribed by a court reporter, calling and cross-examining witnesses under oath, opportunity for submission of proposed findings, etc. At the two-day hearing, for the first time Boynton raised the issue of alleged retaliation. Petitioner testified and presented argument regarding the alleged retaliation.

At the conclusion of the hearing, after reviewing the record, the independent hearing officer concluded that termination was justified for the performance problems.

He considered Petitioner's argument that the termination was based on retaliation, but he found there was no evidence of retaliation and the reasons given were legitimate reasons to pursue a termination.

Upon receipt of the recommendation of the independent hearing officer, the Board of Trustees conducted its own review of the record. The Board hired separate legal counsel to advise them regarding the process and to assist in drafting a decision once it was reached. The Board read the entire record, the proposed findings from the parties, and the recommendation of the hearing officer. After deliberation, the Board voted to terminate employment based upon the same reasons set forth in the findings and recommendation of the independent hearing officer.

The Petition does not make it clear that in the reorganization, when Huebner assumed responsibility for supervision, Bussart then ceased to have any input into the supervision or evaluation of Boynton. Bussart had no part in Huebner's recommendation for termination. He did not know it was occurring and he was not called as a witness by either side at the hearing on her termination.

Boynton's original complaint named both custodial supervisor Bussart and College President Boggs in their individual capacities. A motion for summary judgment was filed on their behalf arguing that the decision to terminate occurred with the hearing officer and the Board's independent review of the evidence and recommendation. Further, it was argued that Boynton had testified that she had always been treated professionally and appropriately by the President, that she had no evidence that he was influenced by a desire to retaliate, and that if he believed Huebner's evaluation, it would have been appropriate for

him to recommend termination. Likewise, it was argued Boynton testified that she was not aware of any evidence that Bussart had been involved in Huebner's recommendation, and that the termination was based on events occurring while Huebner was supervisor. In response to the motion for summary judgment, Boynton conceded the motions for Bussart and President Boggs, but argued that her sole remaining claim against the college as an entity should go to trial.

II. PROCEDURAL BACKGROUND

Plaintiff filed a complaint in the District Court for the District of Wyoming alleging unlawful retaliation and naming college President Tex Boggs, custodial supervisor Gary Bussart, and Western Wyoming College as defendants. After discovery, all three defendants submitted motions for summary judgment. Those motions argued that Petitioner had failed to demonstrate causation between the protected activity and the adverse employment action and had failed to demonstrate that the reasons reached by the independent hearing officer and the Board were pretextual. Petitioner conceded the motions of Defendants Bussart and Boggs, but contended that a trial should go forth on the claim against the Defendant College.

The District Court granted summary judgment on the remaining claim against the college. The court concluded causation was not demonstrated based on the fact that the supervisor making the recommendation had no knowledge of the protected activity *and also* because of the overall evidence, including the fact that the decision to terminate

was made on the evidence at a hearing, reviewed by an independent hearing officer and the Board.

Petitioner appealed the District Court order granting summary judgment. On December 3, 2004, the Tenth Circuit, in an unpublished opinion, affirmed the District Court decision both that the element of causation was not demonstrated and that the Petitioner failed to provide evidence to demonstrate that the reasons given were pretextual. On December 13, 2005 Petitioner filed a Petition for Re-hearing with Suggestion of Re-hearing *En Banc*. The Petition for Re-hearing was denied November 29, 2005. An Order Granting Extension of Time to File a Petition for Writ of Certiorari was issued extending the time to file a Petition to June 5, 2006.

ARGUMENT

I. THE PETITION FAILS TO ADDRESS THE ALTERNATIVE BASIS FOR GRANTING SUMMARY JUDGMENT – THAT PETITIONER COULD NOT DEMONSTRATE THAT THE EMPLOYER'S NON-DISCRIMINATORY REASONS WERE PRETEXTUAL.

Both the District Court and the Tenth Circuit sustained the grant of summary judgment on the dual bases that causation was not shown, and that the Petitioner failed to demonstrate the reasons given were pretextual. The grant of summary judgment can and should be sustained on the basis that Petitioner failed to provide evidence that the college's non-discriminatory reasons were pretextual. There is no need to even reach Petitioner's arguments regarding the causation element.

The Tenth Circuit summarized: "The Court also determined that Boynton failed to demonstrate that WWCC's reasons for terminating her were pretextual. . . . We agree. . . ." The Petition essentially ignores this finding. Other than a single paragraph at page eleven of the Petition very loosely referencing a few of the detailed findings entered by the Board, and the assertion that the reasons are "trivial," Petitioner fails to make any serious argument that the reasons found by the independent hearing officer and written into express formal findings by the Board are pretextual. The outside independent hearing officer – a retired state court judge – found the reasons to be serious and good cause for termination, as did the Board. A review of the reasons given, most of which Petitioner does not dispute, demonstrates legitimate non-discriminatory reasons for termination.

The following are some examples from the official College Board findings which the Petitioner conceded were valid:

> ¶ 23. Boynton, on multiple occasions, demonstrated an inability to consistently discharge work duties in the absence of constant close supervision and exercised poor judgment in the performance of her job duties. She failed to clean a bathroom with urine covering toilet paper, walls and floor because of an invalid concern about overtime. She failed to disengage a faulty fire alarm system, requiring students and staff to stand outside in winter weather while cleaning a smoke detector head when it was apparent there was no fire in the gymnasium.

Petitioner wrote an email documenting that "it looks and smells like someone urinated all over the wall, toilet

paper and floor in the handicapped stall of the downstairs men's room. Now my souls (sic) smell bad and are sticky because I had to walk through it." (Aplee. Supp. App. p. 51) Although Boynton admitted she could have secured permission to stay at the end of her shift to clean it up, she chose to leave it overnight, risking that persons arriving in the morning could be exposed to a health hazard. (Aplee. Supp. App. pp. 51-52) She likewise testified that when the fire alarm went off she checked to determine there was no fire in the gymnasium, but left everyone out in the cold while she got a ladder and climbed up to clean the dirty sensor. (Aplee. Supp. App. pp. 54-55)

> ¶ 24. After working at the Green River Center for three years, Boynton did not or would not learn how to run the snow plow, truck and sander equipment used to clean the roadway entrance to the center. The failure on the part of Boynton to learn her duties resulted in dangerous and slick conditions and resulted on occasion in cars running off the road and patrons being denied access to activities. Boynton either refused or was unable to follow directions given. Boynton's testimony reflected she did not follow supervisor instructions to place dry sand at the front of the sand hopper so sand at the rear could dry. This caused her to use wet sand, making it impossible to operate the sander; Boynton showed a complete inability to remove the snow from the roadway entrance and sand the hill. . . .

Petitioner testified that snow removal was a part of her job, that she was shown how to use the equipment, that she never had success trying to sand the hill, that others felt the hill was slick, and that she didn't dispute that the other custodian/maintenance person was able to

use the equipment successfully on each occasion when she couldn't. (Aplee. Supp. App. pp. 49-51)

> ¶ 26. Boynton refused to perform her security related assigned duties. She was unwilling or unable to adequately supervise unruly children during ballet and hunter safety classes at the Center. She was unable or unwilling to control high school students using the college computers to find pornography on the internet, skateboarding or otherwise engaging in disruptive conduct at the Center. Boynton refused to assume responsibility for security despite the fact that she was clearly assigned responsibility for security by her position description.

Boynton admitted security was part of her duties, that there were problems with students using computers to access pornography and students being disruptive in the halls. (Aplee. Supp. App. pp. 49, 52, 53) She admitted supervisor Huebner instructed her to first tell them to stop, then to tell them to leave the campus if they were noncompliant, and then, if necessary, to call the police. Boynton refused to follow the instructions, saying she couldn't be that mean. (Aplee. Supp. App. pp. 52-53) She admitted she did not respond to security alarms and failed to discuss with her supervisor why she did not respond. (Aplee. Supp. App. p. 34)

It was undisputed that Petitioner had substantial problems with a negative, insubordinate attitude toward her supervisors. The District Court observed that her own deposition demonstrated that she had "substantial disdain for the authority of her supervisor and demonstrated a non-compliant, defiant attitude unquestionably detrimental to her future employment prospects at WWCC." (Dist.

Ct. Order p. 16) As an illustration, the District Court noted:

> By way of example only, Boynton was advised to keep a log of her daily activities by her supervisor as a part of her remediation plan. In her deposition she admits that she kept the logs on paper napkins, paper towels, or toilet paper and could not be bothered to find an alternative means of recording her activities and she 'was not going to provide a notebook for them.' Deposition at 157. This is in stark contrast to her deposition testimony indicating that she kept a notebook regarding her complaints, incidents and disputes with individuals at the college. In the log, for example, Plaintiff notes that she is on a 'pee break'; recorded that between 9:09 and 9:14, she 'readjusted bra strap (rt)' and between 6:12 and 6:16 pm January 16, 'good healthy crap.'

(Dist. Ct. Order p. 16)

While the termination was pending, an incident occurred where Boynton was instructed by Huebner to clean mouse droppings off Huebner's desk. Boynton did not do so and insisted Huebner remove everything from her desk before she would clean it, although Huebner specifically instructed her and gave her permission to clean the desk. Huebner then suspended Boynton without pay for a period of 24 hours (three 8 hour shifts) for insubordination. (Dist. Ct. Order p. 7)

The reasons given by the Board were based on the extensive sworn testimony in the record, particularly Boynton's own testimony. The retired state court judge acting as an independent hearing officer found the reasons for termination worthy of belief, as did the Board. It would be very legitimate for an employer to be concerned that a

custodian left a urine soaked bathroom for someone else to clean another day. There is nothing trivial about repeated unwillingness or inability to keep the entrance and parking lot clear of snow and sanded for safety. Refusing to follow instructions regarding issues like students viewing pornography and disrupting Center activities are significant issues. Likewise, not responding to security alarms and not talking to supervisors about the failures to respond are serious problems.

In addition to the findings quoted, there are additional other significant performance issues set forth in the findings. Neither at the District Court level nor at the Tenth Circuit has the Petitioner ever explained why the specific findings of the Board are unworthy of belief. Instead, Petitioner has relied entirely on Petitioner's subjective, self-serving, opinion expressed in her affidavit that *she* does not consider the reasons given adequate to justify termination. Nevertheless, the hearing officer and the Board both found them to be valid reasons and there is no evidence in the record to suggest that in doing so either the hearing officer or the Board did not believe what they wrote in their findings, but were only using those reasons as a pretext for a hidden motive to retaliate.

Where the employer relied on legitimate reasons for the termination, the claim fails. Because Petitioner did not demonstrate that the legitimate reasons given by the employer were pretextual, the summary judgment must be upheld. *McDonnell-Douglas v. Green*, 411 U.S. 793 (1973).

II. THE PETITIONER'S ARGUMENTS REGARDING THE LEVEL OF SCRUTINY OF CAUSALITY AND THAT SUMMARY JUDGMENT SHOULD BE GRANTED ONLY UPON THE TOTALITY OF THE CIRCUMSTANCES ARE INAPPLICABLE TO THESE FACTS.

The arguments advanced by Petitioner, regarding the level of scrutiny on summary judgment and that courts should look to the totality of the circumstances rather than "discrete facts," are not applicable to the facts or the actual reasoning applied in this case. As to the level of scrutiny, Petitioner outlines a purported difference of view between the circuits as to whether there should be some form of heightened level of scrutiny "where evidence of discrimination is necessarily indirect and inferential." (Petition, p. 19) Assuming *arguendo* that some circuits may not acknowledge or accept the fact that evidence may be indirect or circumstantial in discrimination cases, those holdings do not apply to this case. The District Court did consider what inferences might be drawn from the facts, including Petitioner's argument that an inference could be drawn on "temporal proximity." Likewise, whether the evidence should be viewed based on discrete factors or on a "totality of the evidence" basis cannot be resolved in this case because the District Court used both approaches.

In reaching its decision on causality, the court noted that the recommendation for termination originated with Huebner, who did not know that Petitioner had engaged in protected conduct of complaining about sexual harassment. In argument to the District Court, Petitioner contended Huebner did not know, arguing Huebner "was never informed Boynton had turned Bussart in to the College for bizarre gender-related behavior. . . ." (Aplee.

Supp. App. p. 87; Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 28) The District Court accepted the undisputed fact that the supervisor recommending the termination did not know of the protected conduct, and reasoned that the supervisor could not have been retaliating for something she did not know.

On appeal to the Tenth Circuit, the Petitioner changed the argument to contend that because other College officials knew of the complaint, some inference should be drawn that Huebner could have also known, despite Petitioner's earlier argument to the District Court that she did not know and despite the testimony of all witnesses that Huebner was not informed. Petitioner's complaint is that the Circuit Court's consideration of Huebner's lack of knowledge is focusing on "discrete" items. Such an argument defies common sense and the well established law of multiple circuits. *Peterson v. Utah Department of Corrections,* 301 F.3d 1182, 1188 (10th Cir. 2002). It is self-evident that Huebner was not retaliating against Petitioner for actions Huebner did not know about.

The Petition makes now a *third* different argument, namely that there was knowledge of the protected activity by the Board, since the Petitioner injected such an argument into the record of the hearing before the independent hearing officer. Petitioner contends that the District Court erroneously looked only at the "discrete" fact that Huebner, who recommended termination, didn't know of the protected activity.

The argument misstates the District Court's decision and its reasoning. The District Court indeed found that there could be no inference of discrimination by Huebner

where it could not be established that she knew a protected act had even occurred. However, the District Court also analyzed the evidence in its totality, concluding Petitioner could not establish causation on the evidence as a whole. The District Court's opinion relied on the three-year lapse between her allegation and the termination, the fact the College President actually rejected Bussart's recommendation of termination and reassigned supervision to Huebner, the fact that Huebner did not know of the protected conduct, the fact Boynton "offers no evidence that she was in fact complying with the employer's expectations of improved job performance pursuant to numerous remediation plans," that Boynton's own deposition testimony demonstrates "a non-compliant, defiant attitude," and the fact that the termination occurred after "a full hearing" before the administrative hearing officer, and review of the record by the College Board.

The District Court looked at *all* of the evidence, and judging it in totality, found "there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September 2001 and her termination . . . *All* of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties." (Dist. Ct. Order p. 15, emphasis added) The District Court found no evidence of causation both when analyzing from the viewpoint of the recommending supervisor who didn't know of the protected activity, and when analyzing the evidence as a whole, particularly the decision of the independent hearing officer and the Board.

It is actually the Petitioner who is attempting to isolate discrete facts and ignore the totality of the evidence. The Petitioner places great emphasis on the fact

that the day after Dean Kelsey wrote Petitioner that he had investigated her complaint and was unable to resolve the conflict between her information and the testimony of others, that Petitioner received an evaluation which rated her as "marginal" in one of five subcategories. Petitioner asks the courts to focus on that discrete item, ignoring the context and all other intervening events. Petitioner's narrow focus disregards the fact that the evaluation was very similar to evaluations received prior to the protected activity. It disregards the fact that there was not a continuous pattern of adverse action, but rather the College President instead rejected the first recommendation of termination and assigned a new supervisor who had no knowledge of the protected conduct. It disregards the fact that Petitioner failed to complete two more improvement plans under Huebner's supervision, and that Petitioner did have significant performance problems and conflicts with Huebner while under her supervision. It ignores the fact that Petitioner did not raise any complaint of retaliation either to Huebner or President Boggs when the recommendation was being formulated and reviewed. Most of all, it ignores the fact that Bussart had absolutely nothing to do with either the events or the process that led to her termination, and that the decision was made by the hearing officer and the Board after a full and fair opportunity for Petitioner to present her arguments regarding retaliation.

The District Court decided this case entirely consistent with *Celotex v. Catrett,* 477 U.S. 317 (1986). *Celotex* held that:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a

> party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof considering an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 318.

The District Court's decision does not raise any issue of a split in the circuits. Petitioner argues that there is a difference between the Seventh, Eighth and Eleventh Circuits. Petitioner argues that the Eighth Circuit holds that summary judgment "should be used sparingly in the context of . . . [a] retaliation case . . . " and that courts should " . . . exercise particular caution when examining the factual question of intent . . . " *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112 (8th Cir. 2006) (quoted at page 18 of the Petition). Petitioner argues that the Seventh Circuit uses a standard of "added vigor" in reviewing motions for summary judgment in discrimination cases, citing *Alexander v. Wisconsin Department of Health*, 263 F.3d 673, 681 (7th Cir. 2001). (Petition p. 18) Petitioner seeks to contrast that language to the Eleventh Circuit which Petitioner characterizes as no special caution being required. However, this case arises in the Tenth Circuit, and Petitioner fails to demonstrate that the Tenth Circuit applied any incorrect standard. Even more importantly, the Petition fails to demonstrate how application of any of the allegedly more strict standards for summary judgment voiced in some circuits would change the outcome of this case.

The District Court properly applied the summary judgment standard. It took the position that it would

consider there to be a genuine issue of material fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Likewise, it took the position that "The factual record and reasonable inferences therefrom are construed in the light most favorable to the nonmovant." (Dist. Ct. Order p. 2) The District Court did agree with Petitioner's argument that "Temporal proximity between protected activity and adverse action may . . . support an inference of causation." (Dist. Ct. Order p. 15) However, the Court noted that proximity alone is insufficient where there is a "three year period" between the complaint and the termination, where the person making the termination recommendation did not know of the complaint and where the actual termination decision was based on the recommendation of an independent hearing officer. (Dist. Ct. Order pp. 15-16) Under those circumstances the District Court found, "Boynton must provide other evidence of retaliatory motive if her claim is to survive summary judgment." (Dist. Ct. Order p. 16) The only evidence Petitioner has presented of retaliatory intent is the argument that there was a temporal proximity between her complaint about Bussart and an evaluation of her as marginal in one subcategory of the next evaluation she received from Bussart. Petitioner's arguments about proximity fail to deal with the absence of any evidence, direct or indirect, to demonstrate that Ms. Huebner, who made the recommendation, or the hearing officer and Board, who made the final decision, had retaliatory motives. At most, Petitioner presents an argument which might arguably create an inference of possible retaliation by Mr. Bussart, but he was removed as her supervisor, and had no input into the recommendation or the final decision. Even granting all the inferences to the Petitioner, there is no evidence from which to infer that

Ms. Huebner, the hearing officer, or the Board were motivated by retaliation.

Petitioner has never articulated any reason why an independent hearing officer would have a motive to retaliate against the Petitioner because of her sexual harassment complaint to President Boggs three years earlier. While the hearing officer was exposed to the Petitioner's evidence and argument regarding her contention that the termination was retaliation, there is no evidence or argument that would give rise to an inference that the hearing officer was retaliating when he rendered his advisory findings of fact and recommendation.

There is no basis on which to draw an inference of a retaliatory motive by the Board who accepted the findings of good cause to terminate issued by the independent hearing officer. As the District Court noted, "Boynton has provided no evidence whatsoever as to retaliatory motive other than her own speculation and belief to support her claim of retaliation. Her own subjective opinions are not sufficient." (Dist. Ct. Order p. 16)

While there are circumstances where it might be shown that a manager was simply carrying out the unreviewed recommendation of a biased subordinate, and it might be proper to impute the subordinate's motive to the employer, that is not the case here. Petitioner suggests such a "cat's paw" argument, citing *Stimson v. City of Tuscaloosa,* 186 F.3d 1328, 1332 (11th Cir. 1999). However, the "cat's paw" argument imputing a motive does not apply where there is an intervening independent investigation of the complaints against the employee. *Id.*; *English v.*

Colorado Department of Corrections, 248 F.3d 1002, 1010-1011 (10th Cir 2001); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

Moreover, the Petitioner has never reconciled conceding the motion for summary judgment on behalf of Defendants Bussart and Boggs with its position regarding liability of the college. When faced with a motion that Bussart had no input into the termination recommendation and that neither Bussart nor Boggs made the termination decision, the Petitioner conceded the motion. Despite having conceded that Bussart had no input into the actual termination and that Boggs likewise was not responsible because the actual decision was made by the Board, Petitioner nonetheless persists in basing its factual and legal arguments on actions of Bussart.

A plaintiff cannot meet her burden by "merely asserting that a jury might and legally could disbelieve" the employer's testimony. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). The plaintiff is obligated to "present evidence from which a jury might return a verdict in his favor." *Id.* The District Court and the Tenth Circuit both applied the appropriate standard and concluded that no reasonable jury could find retaliation based on the materials before the courts.

The Petitioner argues that summary judgment in discrimination and retaliation cases is being abused or overused. While that may occur in some instances, summary judgment should not be viewed as some form of illegitimate legal activity. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and

inexpensive determination of every action.'" *Celotex, supra* at 328.

There may very well be room for additional refinement of the rules for summary judgment, possibly including the issues raised in the scholarly articles quoted in the Petition. However, those issues are not present in the facts of this case. This case does not present any opportunity to define those principles further, because regardless of which of the allegedly different approaches is taken, the outcome will be the same due to the overall failure of proof. None of the approaches in use by any of the circuits would deny summary judgment in a context where there is literally no evidence that the decision maker – the hearing officer and the Board – retaliated.

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED

The Petition for Certiorari should be denied because:

1. Petitioner failed to address the alternative basis for summary judgment that Petitioner did not demonstrate that the employer's legitimate proffered reasons were pretextual. Summary judgment should be affirmed on that basis in any event.

2. Petitioner's argument regarding whether the courts should look at "discrete facts" or the totality of evidence is inapplicable because the District used both approaches.

3. Due to a complete failure to provide evidence that the hearing officer and Board were motivated by retaliation, Petitioner's arguments that the circuit courts have differed on the precise standard of review is inapplicable

because summary judgment was appropriate under any of the summary judgment formulations.

4. The legal arguments advanced in the Petition do not correspond to the facts and reasoning actually used by the courts below, making this a poor case to attempt to consider the legal issues surrounding summary judgment standards which Petitioner is attempting to raise.

CONCLUSION

For the reasons set forth, the Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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